

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
Amendment of Parts 15, 73 and 74 of the)	MB Docket No. 15-146
Commission's Rules to Provide for the)	
Preservation of One Vacant Channel in the)	
UHF Television Band For Use By White)	
Space Devices and Wireless Microphones)	
)	
Expanding the Economic and Innovation)	GN Docket No. 12-268
Opportunities of Spectrum Through)	
Incentive Auctions)	

To: The Commission (*Electronically filed via ECFS*)

COMMENTS OF MAKO COMMUNICATIONS, LLC

Mako Communications, LLC ("Mako") hereby submits its comments in response to the Commission's *Notice of Proposed Rulemaking* in the above-captioned proceeding.¹ Mako is the licensee of over 40 low power television and Class A stations. It has previously participated in the Commission's incentive auction rulemaking proceedings. In its *Vacant Channel NPRM*, the Commission tentatively concludes that it should give priority to unlicensed white spaces over LPTV stations when repacking, in direct conflict with Congressional directives as well as Commission precedent. In view of this improper overreach, the Commission must reconsider its tentative conclusions.

The Commission, in its *Vacant Channel NPRM*, tentatively concludes that it should preserve, in each area of the country, at least one vacant television channel for use by unlicensed white space devices and wireless microphones after repacking. In order to achieve this objective, the Commission proposes to require applicants for LPTV, TV Translator and Broadcast Auxiliary

¹ *Amendment of Parts 15, 73 and 74 of the Commission's Rules to Provide for the Preservation of One Vacant Channel in the UHF Television Band For Use By White Space Devices and Wireless Microphones*, Notice of Proposed Rulemaking, MB Docket No. 15-146, GN Docket No. 12-268 (rel. June 16, 2015) ("*Vacant Channel NPRM*").

Service facilities to demonstrate that their proposed new, displacement or modified facilities will not eliminate the last available vacant UHF television channel for use by white space devices and wireless microphones in an area.²

This tentative conclusion has recently been expanded by the Commission in its *Incentive Auction Public Notice*. There, the Commission tentatively concluded that it should designate a second available television channel in the remaining television band in each area of the United States for shared use by unlicensed white space devices and wireless microphones in addition to the one channel it had already proposed.³

The Commission goes to some lengths in its attempt to provide reasoning supporting its proposal to prioritize the spectrum needs of unlicensed white space devices and wireless microphones over those of LPTV and translator stations. However, notwithstanding its imaginative arguments, the Commission's reasoning is simply without validity.

The Commission, itself, has recognized the vital services provided by LPTV stations to viewers throughout the United States.⁴ It is beyond dispute that, after the incentive auction, there will be insufficient spectrum for all LPTV and translator stations currently operating. Since that is so, proposals to make LPTV stations give up the right to use two additional channels will only lead to more stations being forced off the air and constitute a direct loss to viewers. Obviously, LPTV stations that could have used the last two vacant channels in a market -- which channels will now be allocated for use by unlicensed white space devices and wireless microphones -- will have no choice

² *Vacant Channel NPRM*, at paras. 2, 8, 9 and 13.

³ *Public Notice: Broadcast Incentive Auction Scheduled to Begin on March 29, 2016; Procedures for Competitive Bidding in Auction 1000, Including Initial Clearing Target Determination, Qualifying to Bid, and Bidding in Auctions 1001 (Reverse) and 1002 (Forward)*, Public Notice, GN Docket No. 12-268, WT Docket No. 12-269, AU Docket No. 14-252, MB Docket No. 15-146, FCC 15-78 (rel. August 11, 2015) ("Incentive Auction Public Notice") at para. 32.

⁴ *Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television and Television Translator Stations*, Third Notice of Proposed Rulemaking, 29 FCC Rcd 12536, 12537 (2014) ("These [LPTV] stations are a source of diverse and local programming for viewers...")

but to cease broadcast operations, since there is no other spectrum where LPTV stations may go.⁵

With these LPTV stations off the air after the auction, it will result in viewers losing service altogether.

The Commission's justification for concluding that the LPTV service can be trumped by unlicensed service is based on its stated belief that it has almost omnipotent power when it comes to managing spectrum as well as its interpretation of the 2012 Spectrum Act.⁶ However, Section 6403(b)(5) of the Spectrum Act provides that "[n]othing in [Section 6403(b)] shall be construed to alter the spectrum usage rights of low-power television stations."⁷ The Commission counters this by stating that there is no express provision in Section 6403(b) prohibiting the Commission from requiring LPTV or translator stations to consider how their proposed new, displacement or modified facilities will impact the availability of vacant channels for white space devices and wireless microphones. The Commission additionally notes that Section 6403(i)(2) of the Spectrum Act states that nothing in Section 6403(b) "shall be construed to...prevent the implementation of the Commission's '*White Spaces*' *Second Report and Order*'⁸...in the spectrum that remains allocated for broadcast television use after the reorganization required by" Section 6403(b).⁹

However, as even the Commission acknowledges,¹⁰ prior Commission decisions consistently have stated that the future use of the TV band by primary and secondary broadcast users has priority over wireless microphones and white space devices. For example, in the *TV White Spaces Second Report and Order*, the Commission states that "[F]uture broadcast uses of the

⁵ See *Vacant Channel NPRM, Dissenting Statement of Commissioner Ajit Pai*.

⁶ Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, Section 6402 (codified at 47 U.S.C. Section 309(j)(8)(G)), Section 6403 (codified at 47 U.S.C. Section 1452), 126 Stat. 156 (2012) ("Spectrum Act").

⁷ Spectrum Act at Section 6403(b)(5). The Spectrum Act did not elevate unlicensed services over licensed LPTV service.

⁸ *Unlicensed Operation in the TV Broadcast Bands; Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band*, ET Docket Nos. 04-186 and 02-380, Second Report and Order, 23 FCC Rcd 16807 (2008) ("*TV White Spaces Second Report and Order*").

⁹ *Vacant Channel NPRM* at para. 18.

¹⁰ *Id.* at para. 19.

television band will have the right to interference protection...[and] not only must future primary use of the band by broadcasters be protected, but secondary uses...must also be protected.”¹¹

As noted, the Spectrum Act expressly states that the spectrum usage rights of LPTV stations are not to be altered. The Act further states that it should not be construed to prevent the implementation of the Commission’s *TV White Spaces Second Report and Order*. As explained above, the Commission, in that action, expressly stated that both primary and secondary television services were entitled to interference protection from and had priority over unlicensed services. If it was Congress’s intentions that LPTV’s superior rights as to unlicensed services not be altered and its further intention that the Commission’s decision in its *TV White Spaces Second Report and Order* that TV white space devices not interfere with broadcasters be implemented,¹² there is no logical way the Commission can legally determine that unlicensed services, which have never before been accorded priority over LPTV and other licensed services, should now be found to have priority over any licensed services, including LPTV.

Moreover, the Commission’s claim to unlimited authority to manage the spectrum under Title III of the Communications Act of 1934, as amended, does not give it the right to ignore Congressional legislation. Section 6403(i)(1) states that nothing in Section 6403(b) “shall be construed to...expand or contract the authority of the Commission, except as otherwise expressly provided.”¹³ However, Sections 6403(b)(5) and 6403(i)(2) do expressly provide to the contrary. If the Commission’s interpretation of its unlimited authority were accepted, there would be no need

¹¹ *TV White Spaces Second Report and Order*, 23 FCC Rcd at 16827. See also *Digital Television Distributed Transmission System Technologies*, MB Docket No. 05-312, Report and Order, 23 FCC Rcd 16731, 16743 (2008) (declining to restrict TV operations to provide “more vacant channels” for the operation of unlicensed devices).

¹² Thus, the Spectrum Act does not contemplate Part 15 operation in the television band other than under the FCC’s existing white space rules.


¹³ Spectrum Act at Section 6403(i)(1). The Spectrum Act gives the Commission the authority to reorganize the broadcast TV band “for the purpose of making available spectrum *to carry out the forward auction*.” (emphasis added). Making spectrum available for unlicensed services does not carry out the purposes of the auction.

for a Spectrum Act, and the Commission with its “expansive powers” could allocate and assign spectrum as it wished without any limitations. Obviously, that is not what the Spectrum Act intends.

In view of the above, Mako respectfully urges the Commission to reconsider its initial tentative conclusions regarding preserving two vacant channels for use by unlicensed white space devices and wireless microphones in all areas. Such an interpretation is inconsistent with the Spectrum Act as well as Commission precedent. Licensed services have priority over unlicensed services.

Respectfully submitted,

MAKO COMMUNICATIONS, LLC

By: 
Aaron P. Shainis
Lee J. Peltzman
Counsel for
Mako Communications, LLC

SHAINIS & PELTZMAN, CHARTERED
1850 M Street NW, Suite 240
Washington, DC 20036
(202) 293-0011
aaron@s-plaw.com
lee@s-plaw.com

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